(2)
Supreme Court, U.S.
FILED
OCT 6 1994
CLERK

No. 94-96

In the Supreme Court of the United States

OCTOBER TERM, 1994

GOLDEN PACIFIC BANCORP AND
MILES P. JENNINGS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

JULIE L. WILLIAMS
Chief Counsel

ROBERT B. SERINO
Deputy Chief Counsel

L. ROBERT GRIFFIN
ROSA KOPPEL
DAVID C. DOUGLAS
Attorneys
Office of the Comptroller of the Currency
Washington, D.C. 20219

BEST AVAILABLE COPY

13pp

QUESTION PRESENTED

Whether the actions of the Comptroller of the Currency in declaring Golden Pacific National Bank insolvent and appointing the Federal Deposit Insurance Corporation as receiver constituted a compensable taking under the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

FDIC v. *Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (Sept. 16, 1986)	3
Golden Pac. Bancorp v. *Clarke:*	
No. 85-2384 (D.D.C. Dec. 1, 1986)	4
837 F.2d 509 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988)	4
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979)	8
PruneYard Shopping Ctr. v. *Robins*, 447 U.S. 74 (1980)	6
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984)	6, 7, 8
United States v. *Chuang*, 897 F.2d 646 (2d Cir.), cert. denied, 498 U.S. 824 (1990)	3

Constitution and statutes:

U.S. Const. Amend. V (Due Process Clause)	3, 4, 9, 10
Administrative Procedure Act, 5 U.S.C. 701 *et seq.*	3
Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX, § 902(a), 106 Stat. 4516	2
Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*	7
Federal Torts Claims Act, 28 U.S.C. 2671 *et seq.*	3
12 U.S.C. 191	3, 5, 6, 8
12 U.S.C. 1821	9
12 U.S.C. 1821(c)	3

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-96

GOLDEN PACIFIC BANCORP AND
MILES P. JENNINGS, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 15 F.3d 1066. The opinion of the district court (Pet. App. A23-A28) is reported at 25 Cl. Ct. 768.

JURISDICTION

The judgment of the court of appeals was entered on February 8, 1994. A petition for rehearing was denied on April 26, 1994. Pet. App. A21-A22. The petition for a writ of certiorari was filed on July 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Golden Pacific Bancorp (Bancorp) owns approximately 90% of the stock of Golden Pacific National Bank (Bank). Petitioner Miles P. Jennings, Jr. is a shareholder of Bancorp. After unsuccessfully pursuing litigation in federal district court, petitioners filed the present suit against the United States in the United States Claims Court,[1] asserting that the Comptroller of the Currency (Comptroller) effected a compensable taking of petitioners' property when he placed the Bank—which he believed to be insolvent—in receivership. The Claims Court rejected petitioners' claim. Pet. App. A23-A28. The Court of Appeals for the Federal Circuit affirmed. *Id.* at A1-A16.

1. In June 1985, the Comptroller received an informant's tip that the Bank was issuing "yellow" certificates of deposit (yellow CDs),[2] but failing to record them on its books as deposits. Pet. App. A2. Acting on this tip, the Comptroller initiated a surprise investigation of the Bank. *Ibid.* At the conclusion of that investigation, the Comptroller determined that the

[1] Pursuant to the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Tit. IX § 902(a), 106 Stat. 4516, the name of the United States Claims Court was changed to the "United States Court of Federal Claims." We refer to that court hereinafter as the "Claims Court."

[2] The certificates were known as "yellow CDs" because of their color. Like standard certificates of deposit, the yellow CDs bore the Bank's name, stated a fixed rate of interest and maturity date, and were honored by the Bank on demand or maturity. Pet. App. A24. The Bank contended that the yellow CDs were not deposits, which are liabilities of a bank to its customers, but instead investments by the Bank, as custodian, on behalf of its customers' accounts. *Id.* at A2. Under the Bank's characterization, the yellow CDs should have had no impact on the Bank's balance sheet.

yellow CDs were deposits and, as such, had to be accounted for as liabilities of the Bank. *Ibid.*[3] Because the Bank did not prove to the Comptroller's satisfaction that it possessed sufficient assets to offset the liabilities evidenced by the yellow CDs, the Comptroller began to prepare a cease and desist order to prevent any further issuance of yellow CDs by the Bank. *Id.* at A3.

Before the cease and desist order could be issued, however, bank examiners learned of a run on the Bank. Confronted with this situation, and believing that the Bank possessed inadequate assets, the Comptroller declared the Bank insolvent, under 12 U.S.C. 191, and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver, under 12 U.S.C. 1821(c). Pet. App. A3.[4]

2. After the Bank had been placed in receivership, petitioners filed suit against the Comptroller in the United States District Court for the District of Columbia, asserting claims under the Administrative Procedure Act (APA), the Federal Tort Claims Act (FTCA) and the Fifth Amendment. Pet. App. A3. The district court granted summary judgment for the government, without addressing petitioners' Fifth

[3] The Comptroller's determination that the yellow CDs should have been treated as Bank liabilities was subsequently upheld by a federal district court, in an action brought by the Federal Deposit Insurance Corporation (FDIC). See Pet. App. A4 n.7 (citing *FDIC* v. *Holders of Yellow Certificates Nos. 1-367*, No. 85-8164 (S.D.N.Y. Sept. 16, 1986)).

[4] The Bank's president, Joseph Chuang, and a vice-president, Theresa Shieh, were subsequently convicted for, among other things, using false statements, fraudulent documents, phoney signatures, and off-book transactions to deceive federal bank regulators about the Bank's true financial condition. *United States* v. *Chuang*, 897 F.2d 646 (2d Cir.), cert. denied, 498 U.S. 824 (1990).

Amendment claim. *Id.* at A4. Based on its review of the administrative record, the district court concluded that the Comptroller had acted reasonably and within his statutory authority in closing the Bank. *Id.* at A3-A4 (citing *Golden Pac. Bancorp* v. *Clarke*, No. 85-2384 (D.D.C. Dec. 1, 1986)). The court of appeals affirmed, but did not consider petitioners' Fifth Amendment claim because petitioners had raised the claim on appeal only in their reply brief. Pet. App. A4-A5; *Golden Pac. Bancorp* v. *Clarke*, 837 F.2d 509, 513 (D.C. Cir.), cert. denied, 488 U.S. 890 (1988).

3. Petitioners then filed this lawsuit in the Claims Court, asserting once again that the actions of the Comptroller constituted a compensable taking under the Fifth Amendment. The Claims Court granted the government's motion for summary judgment, holding that the Comptroller's actions did not amount to a taking. Pet. App. A23-A28.

On appeal, the Federal Circuit concluded that, regardless of whether the petitioners' claims were judged under a *per se* takings analysis or under the "ad-hoc, factual" analysis employed in cases not involving physical invasion of property, petitioners could establish no Fifth Amendment violation. Pet. App. A9-A10. Addressing petitioners' per se takings claim, the court noted that "[a]t those times when the Comptroller could legally * * * place [the Bank] in receivership, the Bank * * * was unable to exclude the government from its property." *Id.* at A12. Consequently, neither the Bank nor its shareholders "'could have developed a historically rooted expectation of compensation' for the seizure which resulted from the Comptroller's actions." *Ibid.* For the same reason, the court held, petitioners could not demonstrate the interference with "reasonable

investment-backed expectations" needed to establish a regulatory taking. *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 11) that the court of appeals rejected their takings claim solely on the ground that the Bank was "a member of a highly regulated industry." Petitioners argue (Pet. 12) that this broad holding will "foreclose takings claims in vast areas of the nation's economic life."

Petitioners misconstrue the scope of the court of appeals' opinion, which is grounded in the specific facts of this case. The opinion focuses closely on the particular statute at issue, 12 U.S.C. 191, which provided (both at the time petitioners invested in the Bank and at the time the Comptroller declared the Bank insolvent) that "whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination * * * appoint a receiver." 12 U.S.C. 191. As petitioners had voluntarily invested in the Bank, the court found that petitioners should be deemed to have incorporated into their "reasonable investment-backed expectations" the potential impact on the Bank of the possible closure of the Bank by the Comptroller under Section 191 if the Comptroller were to become satisfied (rightly or wrongly) that the Bank had become insolvent. Pet. App. A12 ("Golden Pacific could not have reasonably expected that the government 'would fail to enforce the applicable statutes and regulations.'"). Because the possibility that the Comptroller could close the Bank was apparent on the face of Section 191, the court held that petitioners could not have "developed a historically rooted expectation of compensation" for a receivership instituted under that statute. Pet. App. A12.

2. Petitioners argue further (Pet. 12-16) that the Federal Circuit's opinion conflicts with this Court's decision in *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984). The argument is without merit. As petitioners acknowledge, under *Monsanto* and other applicable Supreme Court precedent, "[c]ourts still must engage in an *ad hoc*, intensely factual inquiry to decide whether government regulation triggers the Fifth Amendment." Pet. 13. In *Monsanto*, this Court stated:

> The Court * * * has identified several factors that should be taken into account when determining whether a governmental action has gone beyond "regulation" and effects a "taking." Among those factors are: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations."

467 U.S. at 1005 (quoting *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 83 (1980)). The Court noted that in some cases, the last of these factors—whether there has been interference with "reasonable investment-backed expectations"—can be "so overwhelming * * * it disposes of the taking question." *Monsanto*, 467 U.S. at 1005.

Here, the only "reasonable investment-backed expectation" that petitioners could have had was that the Comptroller would not close the Bank unless he was satisfied that it was insolvent. Petitioners acknowledge that it was foreseeable that a solvent bank might be closed under the Section 191 standards. Pet. 16. But they argue that they nonetheless possessed a sufficiently "reasonable investment-backed expectation" that the Bank would not be closed if solvent to satisfy *Monsanto*'s requirements for establishing a taking.

To begin with, although there has been no judicial finding that the Bank was insolvent, the findings made by the district courts in connection with the receivership establish, at least, that the Bank was not clearly solvent when closed. As noted above, a federal district court ruled that the Comptroller correctly classified the yellow CDs as deposits. Once he had correctly classified the yellow CDs as deposits, the Comptroller reasonably concluded the bank was insolvent when the Bank failed to demonstrate that it had sufficient assets to offset the liabilities represented by those deposits. Even after the determination of insolvency, the Comptroller appointed the FDIC as receiver only when a run on the Bank exacerbated the situation. Although petitioners differ with the Comptroller's judgment, a federal district court familiar with the record has found the Comptroller's actions reasonable. These facts make clear that the Comptroller's appointment of a receiver for the Bank was no unforseeable, aberrant action, but rather a predictable response to the Bank's serious financial circumstances.

Second, the Federal Circuit's rejection of their takings claims is fully consistent with *Monsanto*. The question at issue in that case was whether amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), which permitted the disclosure of previously confidential trade secrets included in data submitted to the Environmental Protection Agency (EPA), could constitute a taking of property under the Fifth Amendment. When Monsanto had submitted data to the EPA between 1972 and 1978, prior to the enactment of the FIFRA amendments, "the Federal Government had explicitly guaranteed * * * an extensive measure of confidentiality and exclusive use."

467 U.S. at 1011. This Court held that disclosure under the FIFRA amendments of trade secrets included in earlier-submitted data would constitute a compensable taking. In this case, by contrast, there was no change in the rules; the government never guaranteed that a solvent bank would not be closed.[5]

Third, even if it was probable that a solvent bank would not be closed under Section 191, the concept of "reasonable investment-backed expectations" has never been understood to refer only to the single most probable outcome. To the contrary, it has always been understood to encompass the realm of reasonably expected outcomes, a territory that clearly includes the foreseeable consequences of the enforcement of ordinary, preexisting government regulations. See *Kaiser Aetna* v. *United States*, 444 U.S. 164, 178 (1979). Although the probability of a mistaken closing of a solvent bank might have been low, petitioners' concession that the occurrence was foreseeable, Pet. 16, effectively precludes their takings claim.

3. Finally, petitioners claim that this case presents a particularly egregious example of a government taking, because the government not only put the Bank into

[5] Petitioners contend (Pet. 14-15) that the 1972-1978 regulations at issue in *Monsanto* similarly had no iron-clad guarantee against wrongful disclosure. Like Section 191, which permits the Comptroller to act when he is "satisfied" of insolvency, the EPA could disclose data prior to the 1978 amendments so long as "in [the] EPA's judgment," the data contained no trade secrets. Pet. 14 (quoting *Monsanto*, 467 U.S. at 992). Petitioners' observations about the 1972-1978 regulations are accurate but irrelevant, because the Court was not presented in *Monsanto* with a claim of mistaken disclosure under those rules, but rather with a challenge to Congress's retroactive elimination of the degree of protection afforded by the prior regulations.

receivership but also claimed for itself surplus assets remaining after the depositors and creditors had been paid in full. Pet. 5. Petitioners' argument on this point goes well beyond any evidence presented to or facts found by the Claims Court or the Federal Circuit. See Gov't C.A. Br. 2-4 & nn. 2, 3. Moreover, their claim that the FDIC appropriated surplus assets is factually incorrect. Contrary to petitioners' contention, there were no surplus assets. The Bank's uninsured depositors and creditors eventually received the principal, but not the interest, owing on their claims, and even that limited repayment was made possible only as the result of the government's $14 million settlement with the Bank's former president. See *id.* at 20 n.21. Finally, the FDIC was obligated, under 12 U.S.C. 1821, to distribute to a bank's shareholders any post-receivership surplus. If the FDIC had failed to distribute surplus assets in accordance with the statute, its actions would have been unauthorized and could not form the basis for a takings claim. See Pet. App. A15-A16.

4. Wholly aside from the merits, this case does not warrant review because petitioners' Fifth Amendment claim is barred by *res judicata*. As indicated above, petitioners had asserted a Fifth Amendment claim seeking monetary and injunctive relief in a prior action in district court. Although the district court in that action did not specifically address petitioners' Fifth Amendment claim, it granted the government's summary judgment motion in full. Pet. App. A3-A4. Petitioners then failed to raise the Fifth Amendment claim in their initial brief in the court of appeals, invoking it only in their reply brief. See Pet. App. A5. For that reason, the court of appeals refused to consider the Fifth Amendment claim. Petitioners should be deemed to have

waived the Fifth Amendment claim by their failure to pursue it in the prior lawsuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DOUGLAS N. LETTER
STEPHANIE R. MARCUS
Attorneys

JULIE L. WILLIAMS
Chief Counsel

ROBERT B. SERINO
Deputy Chief Counsel

L. ROBERT GRIFFIN
ROSA KOPPEL
DAVID C. DOUGLAS
Attorneys
Office of the Comptroller of the Currency

OCTOBER 1994